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IN THE

Supreme Court of the United States

October Term, 1966.

No. 773

MANDELL, SPECTOR, RUDOLPH CO.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Supreme Court of the United States.

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No.

MANDELL, SPECTOR, RUDOLPH CO.,
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THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Mandell, Spector, Rudolph Co., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed an order of the Judicial Officer of the Department of Agriculture.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Third Circuit is reported at 364 F. 2d 889 and is reprinted in the Appendix, *infra*, pp. 11-20. The opinions of the Judicial Officer of the Department of Agriculture are reported at 24 A. D. 651, 897, 1025, and are reprinted in the Joint Appendix filed in the Court of Appeals at pp. 594a-645a thereof, copies of which have been deposited herewith. The Hearing Examiner's Recommended Decision is also reprinted in the deposited Joint Appendix at pp. 479a-571a thereof.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit sought to be reviewed was entered on September 23, 1966. A Petition for Rehearing was denied on September 23, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and 5 U. S. C. § 1040.

QUESTION PRESENTED.

Petitioner-licensee, having been accused of violating accounting and record-keeping provisions of the Perishable Agricultural Commodities Act, tendered repayment of the alleged underpayments and corrected its record-keeping system to conform with the Act and Regulations thereunder. There has been no further complaint against it for any reason since that time, 1962. The Department of Agriculture refused to accept petitioner-licensee's tendered repayment as constituting compliance and took the position that it was impossible for petitioner to achieve compliance, notwithstanding the right to achieve compliance provided to federal licensees by the Administrative Procedure Act. In disciplinary proceedings before the Judicial Officer for the Secretary of Agriculture, a 90-day license suspension was imposed which, it is admitted, will effectively destroy petitioner's business permanently. The Court of Appeals for the Third Circuit affirmed. Therefore, the question presented is:

Did not the administrative procedure affirmed by the court below eliminate from the Administrative Procedure Act and deny to petitioner the vital protection guaranteed by Congress to federal licensees accused of statutory violations—the right to achieve compliance with the law in advance of license suspension proceedings?

STATUTE INVOLVED.

§ 9(b) of the Administrative Procedure Act, 60 Stat. 242, 5 U. S. C. § 1008(b) is the statutory provision here in question (the language relevant to this case is italicized):

"In the exercise of any power or authority—

* * *

(b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, *no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor,* facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing *and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.* In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

STATEMENT OF THE CASE.

During 1961 and 1962 officers of the United States Department of Agriculture investigated the records of petitioner Mandell, Spector, Rudolph Company (MSR), a Philadelphia wholesaler of fresh fruits and vegetables. The investigators claimed that MSR had violated the Perishable Agricultural Commodities Act (PACA) by failing to maintain adequate records and by underpaying and failing properly to account to a few of its shippers and consignors.[1]

At the conclusion of the investigations, petitioner, without admitting liability, issued a check in the full amount of the alleged underpayment to one consignor and tendered repayment of the remaining alleged underpayments.[2] In addition, petitioner revised and reformed its record-keeping system to bring it into strict, technical compliance with the applicable Regulations under the PACA.

The officers of the Department of Agriculture took the position that petitioner could not demonstrate or achieve compliance with the PACA, since it could not undo its past violations. Accordingly, the Department refused to accept the tendered repayments as constituting compliance and ignored the fact that petitioner's record-keeping reforms had cured the deficiencies charged by the investigators.

The Department, in token recognition of the requirements of Section 9(b) of the Administrative Procedure Act, sent petitioner a formal notice of the alleged violations. It then instituted license revocation proceedings under §§ 2 and 9 of the PACA (7 U. S. C. §§ 499b, 499i), in which the

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1. Underpayments and *overpayments* were claimed which aggregated a total underpayment of only $3,856 over a period of a year and a half, in a business with a volume of $5,000,000 per year.

2. No subsequent complaint has been received from any private party or Government officer concerning petitioner's accounts of sales or record-keeping. This remains true to the present time, during which petitioner's business has been in continuous operation.

Judicial Officer ordered petitioner's license suspended for 90 days.[3] The Court of Appeals for the Third Circuit affirmed. It is admitted that the license suspension for such an extended period will destroy petitioner's business grossing approximately $5,000,000 a year because of alleged estimated non-willful underpayments (and *overpayments*) totaling $3,856, payment of which petitioner has tendered, and destroy the jobs of its 30 employees.

3. The Department did not charge that the alleged violations had been willful, and no finding of willfulness was made by the Judicial Officer.

REASONS FOR GRANTING THE WRIT.

The Third Circuit's Decision Eliminates From § 9(b) of the Administrative Procedure Act the Right to Achieve Compliance Guaranteed by Congressional Statute to Prevent Administrative Abuse of the Licensing Power.

The federal question here at issue is one of vital importance, not merely to petitioner and the Department of Agriculture, but to the hundreds of thousands of holders of federal licenses throughout the country. Congress enacted § 9(b) of the Administrative Procedure Act in recognition that the power to suspend and revoke licenses is literally the power of commercial life and death. In order to restrict the use of this most powerful of weapons in the administrative agency's arsenal, Congress established both procedural and substantive safeguards to the licensee which were to come into play prior to any license suspension proceeding. See Note, "Procedural Safeguards for Licensees: Section 9(B) of the APA," 75 Harv. L. Rev. 383-84 (1961).

Section 9(b) first requires written notice of the alleged violations which may warrant suspension. In this respect Congress merely restated the pre-existing due process requirement of notice and opportunity to defend. But Congress went much further by requiring in addition[4] that

4. An examination of the Congressional Record and the committee reports leaves no doubt that the opportunity to achieve compliance was to be a protection to the licensee in addition to the notice requirement. Remarks of Rep. Walter, 92 Congressional Record 5654, 79th Cong., 2nd Sess. (1946), reprinted, Sen. Doc. 248, 79th Cong., 2nd Sess., p. 368. See also remarks of Senator McCaren, reprinted, Sen. Doc. 248, p. 323; House Report No. 1980, 79th Cong., 2nd Sess., pp. 40-41, reprinted, Sen. Doc. 248, pp. 274-75; Senate Report No. 752, 79th Cong., 1st Sess., reprinted, Sen. Doc. 248, p. 211.

"the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements" prior to institution of suspension proceedings. The nature of this "opportunity" was explained by the Senate Judiciary Committee as *"an opportunity for the correction of conduct questioned by the agency"*. (Senate Document 248, 79th Cong., 2nd Sess., 1946, p. 35.) (Emphasis supplied.)

The Department of Agriculture in the present case adopted a position obviously at odds with the plain language of § 9(b) which guarantees petitioner the right to "achieve compliance" as a condition precedent to disciplinary action. The Department successfully contended below that the accountings already rendered could not be undone, and that the reformed record-keeping system could not amount to compliance in the past when proper records had not been kept.[5]

To say that a licensee does not "achieve compliance" unless he demonstrates *past* compliance—the equivalent of a successful denial of the offense charged—is clearly to eliminate the right of "compliance" from the Act and re-

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5. The Government's position was summarized as follows at pp. 44-45 of its brief below:

> "The short of the matter is that, as to the false accountings which had been rendered, MSR *could not* of course, 'achieve compliance'; *i.e., it could not undo the erroneous accounts sales* which had been rendered. And, while it had every opportunity to 'demonstrate' compliance throughout the administrative proceedings, it utterly failed to do so. . . . And, whether or not petitioner may now be keeping accurate and proper records, that does not amount to 'compliance' in the past when proper records admittedly were not kept."

Thus, the Department of Justice rejected its own previous interpretation of § 9(b) as set forth in the Attorney General's Manual on the Administrative Procedure Act, p. 90 (1947), and quoted in Lavery, Federal Administrative Law, § 125 (1952), p. 74:

> "This sentence requires an Agency to *give a Licensee an opportunity to change his conduct* before his License can be revoked by any Agency, ..." (Emphasis supplied.)

duce the two-fold protection of § 9(b) merely to the single and pre-existing due process protection of notice and opportunity to defend. Yet the Judicial Officer and the Court of Appeals adopted the Department's construction of § 9(b) and found that the Administrative Procedure Act had been satisfied by the mere sending of a formal letter giving notice of the violations charged. The construction of the court below, unless reviewed and reversed by this Court, will drastically curtail the protections to federal licensees expressly provided by Congress. It will relieve administrative agencies of the burden of ever having to prove willfulness in license suspension or revocation proceedings. Administrative officers, under this decision, will be able to impose at will the capital punishment of commercial extinction for first offenses and unintentional misconduct violative of even the most minor of the myriad regulations under which federal licensees must operate.

It was this very danger which Congress sought to remedy by enacting § 9(b) and granting licensees the right to take corrective action before losing their licenses. This Court has said in construing another provision of § 9(b), "Where the remedy for an evil is clear, the remedial provisions of the Administrative Procedure Act should be given full effect." *Pan Atlantic SS. Corp. v. Atlantic C. L. RR.*, 353 U. S. 436, 440, 1 L. Ed. 2d 963, 77 S. Ct. 999 (1957). It is therefore imperative that this Court resolve the construction of § 9(b) to preserve to the licensee the right to "a second chance"[6] to reform his conduct which Congress intended and provided as a limitation on the Administrative power over licenses.

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6. Note, *supra*, 75 Harv. L. Rev. 383, 384, 386.

CONCLUSION.

For the reasons stated above, this Court should grant the petition and issue a writ of certiorari to review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15451

MANDELL, SPECTOR, RUDOLPH CO.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY OF AGRICULTURE

Argued March 24, 1966

Before McLAUGHLIN, HASTIE and GANEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 24, 1966)

By GANEY, *Circuit Judge.*

This is an appeal under the Judicial Review Act of 1950,[1] seeking a review of an order issued by the Judicial

1. 64 Stat. 1127, as amended, 5 U. S. C. 1031, et seq.

Officer of the Department of Agriculture, pursuant to authority delegated to him by the Secretary of Agriculture. The order was issued pursuant to the Perishable Agricultural Commodities Act, wherein the petitioner was suspended for 90 days from operating in interstate commerce as a commission merchant, dealer and broker in fresh fruits and vegetables. The execution of this order has been stayed by the Judicial Officer pending the outcome of this appeal.

The Perishable Agricultural Commodities Act requires of all persons transacting business in fresh fruits and vegetables in interstate and foreign commerce as commission merchants, brokers or dealers, to be licensed under the Act. 7 U. S. C. 499c. The Act makes it unlawful for persons to engage in "unfair conduct" as defined in 7 U. S. C. 499b. The relevant subsection (4) makes it unlawful—

> For any commission merchant, dealer, or broker . . . to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; . . . .

The statute provides for the filing of a complaint with the Secretary of Agriculture of anyone complaining of a violation and whenever the Secretary deems it warranted, a copy of the complaint made will be forwarded by the Secretary to the commission merchant, dealer or broker, who will be called upon to answer. 7 U. S. C. 499f(a). Additionally, 7 U. S. C. 499f(b) provides as follows:

> Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any employee of the United States Department of Agriculture or any interested person may file, in accordance

> with rules and regulations of the Secretary,[2] a complaint of any violation of any provision of this chapter by any commission merchant, dealer, or broker and may request an investigation of such complaint by the Secretary.

If, in the opinion of the Secretary, the facts so warrant, he may have the complaint served on the person concerned and afford him an opportunity for a hearing before a hearing examiner and, in accordance with the provisions of 7 U. S. C. 499b, if the violation is proven, he may suspend the license of the offender for a period not to extend 90 days.

In addition, licensed brokers are required to assign a lot number to each load of the products received and to be sold for the account of another and enter the assigned lot number on the receiving record in connection with the respective loads and on sales tickets identifying sales from such lots and such lot numbers shall be placed on the sales tickets at the time of the sale. Additionally, these records and documents must be kept in file for a period of 2 years.

In early 1961, Hicks Produce, Inc., filed with the Department of Agriculture a complaint concerning 57 shipments of tomatoes consigned to the petitioner for its account. These shipments comprised 98,692 cartons of tomatoes. Upon investigation by the Department, the books of the petitioner were examined for the period through May, 1961, during which the above shipments had been handled by the petitioner. The investigators were unable to secure the accounts receivable records for this period for the reason, as averred in the petition for review, certain business records were unavailable since it was alleged they had disappeared in an accident which had occurred in a

2. 7 U. S. C. 499o gives the Secretary authority to make such rules and regulations as may be necessary to carry out the provisions of the Act. 7 C. F. R. 47.27(b) provides that "Disciplinary proceedings may be instituted only upon moving papers filed by the Deputy Administrator acting either as a result of the informal-complaint proceduce hereinbefore provided *or on his own motion.*" (Italics ours.)

storage place of petitioner's business. However, the investigators compared invoices reflecting the sale of Hicks' tomatoes with prices actually paid by the buyers and a comparison of the prices actually paid revealed a number of discrepancies and, as a result of their examination, the investigators were able to identify sales of 83,313 containers and they reconstructed an account sales which showed net proceeds of $106,221.77 in connection therewith. Comparison of the figures reported by the petitioner to Hicks showed net proceeds of $104,545.57; there thus was an underpayment by the petitioner to Hicks of $1,676.20.

Accordingly, on April 17, 1962, after the investigation of Hicks was completed, representatives of the Department of Agriculture met with the officers of the petitioner and their attorney and went over their findings. While there was a denial of any underpayment or discrepancies by the petitioner, in order to close the matter out the petitioner tendered a check for $1,676.20, payable to Hicks.

On the next day, April 18, 1962, the chief investigator for the Department of Agriculture, Koenigsburg, informed the officers of the petitioner that, in conformity with the Department's procedure, its records would be spot-checked to determine whether the Hicks case was an "isolated case" or whether it was a regular practice. The record discloses that at that time an informal disciplinary complaint was served by Investigator Koenigsburg upon the respondent, but, on motion of the petitioner when listed for argument in this court, any reference to this informal complaint was stricken by the court since the complaint itself was not introduced in evidence and made a part of the record in the case.

The main thrust of the petitioner's contention is that prior to the commencement of this second of the two investigations on April 18, 1962, one day after the completion of the Hicks investigation, which uncovered wrongdoing, there had not been filed by the Secretary of Agriculture "a

complaint by a person aggrieved by an alleged violation of the Act."

However, at that time no objection was raised by the petitioner to the investigators' perusal of the company's books, but, in fact, it advised them that it would cooperate fully and would furnish all books, records and accounts to be available to the investigators who began the investigation the following day. As adverted to above, and at the petitioner's suggestion, it placed at the disposal of the investigators all of the books, records, etc., that were available. It can thus be readily seen that the petitioner had adequate notice of the investigation and was willing that it proceed and by their conduct in placing the books and records that were available at the investigators' disposal, waived any technicality of being served with an informal complaint. Furthermore, it can be seen that this investigation, one day later, stemmed from the Hicks investigation which was begun after a complaint, so there was continuity of the investigation to determine additional wrongdoing, prompted by the discovery of the wrongdoing discovered in the Hicks investigation. There would be manifest unfairness to the Department of Agriculture if this objection, raised long after the administrative process was over, and occasioned by the Government's failure to make the informal complaint part of the record, caused us to hold that the requirement of such an "informal disciplinary complaint" was requisite, and could not be waived by respondent's consent. In the face of the petitioner's agreement to the investigation, the aid and assistance rendered by it, it was tantamount to a waiver of the requirement of the statute, as we shall in more detail point out.

The investigators selected, at random for detailed investigation, 35 shipments received by the petitioner during the period October 4, 1960, through April 12, 1962, and they discovered that the petitioner (1) did not maintain proper receiving records at the store or depot; (2) while sales at the store were not identified by lot numbers in all

cases, in many cases shipper's initials or other identifying marks had been used, which method, while unsatisfactory in a number of cases, was the only available method; (3) while the sales made at the depot were identified by the number of the railroad car in which the produce was received, when a portion of the shipment was transferred to the store for sale, a ticket was issued showing a sale to the store at a price which was normally lower than other sales made at the depot; and (4) the petitioner's accounts receivable records for the period January 1, to July 1, 1961, were missing and they alleged they had been lost or inadvertently destroyed.

Based on the petitioner's records, the investigators compared account sales for these shipments with the account sales petitioner had actually rendered to the shippers and in each of the 35 instances, the comparisons disclosed discrepancies ranging from an underpayment of $840.26 to an overpayment of $159.62, which is substantially supported in the record.

On May 23, 1962, after completion of the investigation, the investigators again met with Messrs. Mandell, Spector and Rudolph, and Ned Stein, their attorney, and advised them of the results of their investigation.

Later, on July 26, 1962, the Department wrote to the petitioner a 78 page letter setting out in a most detailed accounting each one of the 35 cases investigated and noted the underpayments and discrepancies therein. While it is a fact that the sales from the shipments received had to be reconstructed both at the petitioner's store location, as well as those at the depot location (two service centers maintained by the petitioner), by matching sales tickets and shipments name or initials; and, further, that fewer sales of a commodity from a shipment could be found than were actually contained in that shipment, in which instances the investigators were compelled to compute an average price of a commodity from the identifiable sales of a particular shipment, nevertheless, all of this was the best and only

method available by reason of mislaid or lost records and the failure to assign lot numbers to shipments by the petitioner.

Some six months later, on November 27, 1962, the Department again wrote to the petitioner explaining that an examination of the records of the Hicks case revealed that it did not maintain proper receiving records, that it did not assign and use lot numbers and that it was unable to locate and produce the accounts receivable ledgers. It also reminded petitioner of the fact that it had tendered to Hicks a check in the amount of $1,676.20 in restitution of its underpayment; that concerning the additional investigation made as a result of what was uncovered in the Hicks case, 35 additional shipments were investigated covering a period from October, 1960, to April, 1962, which revealed that it had under-reported and under-paid the net proceeds of 28 shipments and had over-reported and overpaid in 7 shipments. It can thus be seen that, here again, the Government reiterated to the petitioner the discrepancies that it had previously found. The letter further advised petitioner that it was to make restitution of the underpayments, but it had declined to so do and that violations such as had been found were of sufficient grounds to institute disciplinary action which could result in the revocation or suspension of its license and, finally, the letter was addressed to it, as stated, in compliance with § 9(b) of the Administrative Procedure Act, 5 U. S. C. 1008(b), and they were now affording petitioner an opportunity to furnish any explanation or comments pertaining to the transactions therein listed and stating that its reply should reach the office of the Department not later than December 19, 1962.

Ned Stein, attorney for the petitioner, replied to this letter on December 17, 1962, and he specifically denied the underpayments, as well as the overpayments, and admitted therein that a request had been made for payment of these underpayments, but his client felt that there was

no liability therefor and that, "Under the circumstances, my client is desirous of defending any disciplinary action which your department may care to institute."

The record discloses that at the hearing before Examiner Curry on March 24, 1964, Eugene N. Carlucci, an investigator, testified with respect to 25 of the underpayments discovered, as follows:

> We advised them [petitioner] of the discrepancies in the last 25 accountings. And Mr. Stein [counsel for the petitioner] stated that he could not dispute our figures, as we had thoroughly examined the records, and the figures were obtained from his client's records. We asked the officers of the firm if they thought differently, and they replied that they did not. Mr. Mandell said that there must be some explanation because they actually did not underpay anyone even though the records indicated they did.
>
> Mr. Stein also said at this time he wanted to discuss this matter with Mr. Gardner and Mr. Dimond before recommending the payment of the underpayments found.
>
> Q. At that time they could not come forward with any explanation as to the discrepancies that you found?
>
> A. No, sir.
>
> Q. At that time did they attempt to indicate to you how they arrived at the manner in which they put together the figures from which they made up their respondent's account sales?
>
> A. No, sir.

On March 20, 1963, the acting director of the Fruit and Vegetable Division filed with the Secretary of Agriculture a formal complaint charging petitioner with (1) having failed to account and make payment for the net proceeds realized from sales concerned; (2) having failed to maintain and preserve such accounts and state fully and correctly all transactions involved in its business; and (3) having repeatedly and flagrantly violated 7 U. S. C. 499b

by its failure to account and make payment truly and correctly. Petitioner's license automatically terminated on October 21, 1963, because of their failure to pay the annual licensing fee which was apparently an oversight on its part, rather than a desire on its part to permit the license to terminate. In December, 1963, the Director of the Fruit and Vegetable Division filed with the Secretary notice to show cause why a license should not be denied to the petitioner, the grounds therein asserted being substantially identical to those previously made in the complaint. The two proceedings were consolidated and a hearing conducted in Philadelphia before a hearing examiner. In December, 1964, the hearing examiner recommended that any license held by the petitioner under the Act be revoked and its application for a new license denied, to which exceptions were duly filed by the petitioner.

Following oral argument, on May 14, 1964, the Judicial Officer entered his order containing extensive findings of fact and conclusions of law with respect to the Hicks transaction and with respect to the erroneous accounting concerning the 35 other lots which the investigators had examined. He also found that, by letter dated November 27, 1962, sent in accordance with § 9(b) of the Administrative Procedure Act, 5 U. S. C. 1008(b), petitioner had been afforded the opportunity to achieve compliance with the Act, but failed to so do. He also found that the averaging of sales was not arbitrary and had basis in fact and logic to support it and could not be characterized as unreasonable and was necessary to arrive at the approximate amount actually owing to the consignors and joint account partners. He considered the violations "the most serious and flagrant type possible under the act" since they involved "breaches of fiduciary duty by an agent to his principal and by a joint account partner to his joint venturer" and, finally, ordered the suspension for ninety days of any license held by the petitioner and that a new license should not be issued until the expiration of that period.

In *American Export and Isbrandtsen v. Federal Maritime Commission*, 334 F. 2d 185, where a letter, in an instance similar to the factual situation here under review, was held not to be a formal complaint, nevertheless the court held that from a review of the record they were satisfied that no substantial right of due process was denied to the petitioner and no prejudice was suffered by it by its failure to comply with Rule 5(b) and 8(c) concerning formal complaints under the Federal Maritime Commission Rules of Practice and Procedure, 46 C. F. R. c.iv § 502.67.

It is submitted that § 9(b) of the Administrative Procedure Act, 5 U. S. C. § 1008(b),[3] was fully complied with here by reason of the fact that the petitioner was notified by letter of the violations and given an opportunity to redress its misconduct, but it failed to so do.

It is submitted the Secretary of Agriculture sustained the burden of proving violations of the Perishable Agricultural Commodities Act for purpose of imposing a punitive license suspension and that his order of license suspension should be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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3. This section, in pertinent part, provides: "Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension or revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all the lawful requirements."

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 773

MANDELL, SPECTOR, RUDOLPH CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 11–20) is reported at 364 F. 2d 889. The decisions and orders of the Judicial Officer of the Department of Agriculture (R. 594a) [1] are reported at 24 A.D. 651, 897, 1025.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1966. A timely petition for rehearing was denied on September 23, 1966. The petition for a writ of certiorari was filed on November 15, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the two-volume Joint Appendix in the court of appeals, nine copies of which petitioner has filed with the Clerk of this Court.

QUESTION PRESENTED

Whether the disciplinary proceedings instituted against petitioner were consistent with the provision of Section 9(b) of the Administrative Procedure Act which accords licensees a prior opportunity to rectify non-willful violations of law.

STATUTE INVOLVED

Section 9(b) of the Administrative Procedure Act (hereinafter "APA"), 60 Stat. 242, 5 U.S.C. 1008(b), provides, in relevant part, as follows:

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.[2]

STATEMENT

Petitioner corporation was licensed under the Perishable Agricultural Commodities Act of 1930 (hereinafter "PACA")[3] to do business in interstate commerce as a commission merchant, broker, and dealer

[2] As a result of the recent revision and enactment into positive law of Title 5 of the United States Code (Public Law 89-554, 80 Stat. 378), Section 9(b) of the APA is now codified as 5 U.S.C. 558(c).

[3] 46 Stat. 531, as amended, 7 U.S.C. 499a–499s.

in fresh fruits and vegetables (R. 3a, 19a). The PACA makes it unlawful for licensees " * * * to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction * * * to the person with whom such transaction is had * * *" (7 U.S.C. 499b(4)). In addition, the PACA provides for the filing of a complaint with the Secretary of Agriculture by anyone asserting a violation, and authorizes an investigation by the Secretary of the matter complained of which may, if the facts so warrant, lead to a hearing on whether a violation has in fact occurred (7 U.S.C. 499f) and what sanctions, if any, should be imposed on the violator (7 U.S.C. 499g, 499h).

In early 1961, as a result of a complaint of underpayments by Hicks Produce, Inc., the Department of Agriculture began an investigation regarding 57 shipments of tomatoes which Hicks had consigned to petitioner for its account during the period between January and May 1961 (R. 397a). The Department's detailed investigation revealed that the prices actually paid by some of the purchasers of the tomatoes were higher than the prices shown on petitioner's sales tickets, and that, while petitioner collected the higher amounts from the purchasers, it accounted to Hicks on the basis of the lower sales ticket prices (R. 397a–407a). The investigation also revealed that petitioner charged Hicks for cartage on a large sale of tomatoes when, in fact, the tomatoes were transported in Hicks' own truck and no cartage expense was incurred (R.

400a–401a). After the completion of the investigation, a check in the amount of the total underpayment, $1,676.20, payable to Hicks, was issued by petitioner and given to the Department's representative (R. 52a–53a).

The Department then served an informal disciplinary complaint on petitioner and began a "spot-check" of its records to determine whether the Hicks case was an isolated instance of underpayments or, rather, a manifestation of a regular practice (R. 53a). The Department's investigators selected at random for detailed examination 35 shipments which petitioner received from shippers other than Hicks during the period October 4, 1960 through April 12, 1962 (R. 318a–394a). This second investigation revealed discrepancies in all 35 of the cases examined: underpayments to shippers totalled $4,174.88 in 28 cases, and overpayments totalled $318.38 in 7 cases (R. 395a).[4] When the investigators compared the accountings which petitioner rendered to shippers with petitioner's own sales records, they found no relationship between the quantities and prices on the two types of documents (*e.g.*, R. 352a). The investigators also found that, in a number of cases, instead of notifying a shipper when a substantial portion of a shipment had been badly damaged in transit, peti-

[4] In several instances petitioner's records contained notations which indicated that overpayments were deliberately made (*e.g.*, R. 336a, 391a).

tioner falsely reported sales of the damaged merchandise at fictitious prices, took its commissions on those fictitious amounts, and collected on the damage claims from the railroads (*e.g.*, R. 213a–214a, 369a–370a). Additionally, it was disclosed that petitioner frequently charged a shipper for cartage from its depot to its store when, in fact, no such expense had been incurred (*e.g.*, R. 358a, 363a, 370a). Shortly after completion of this second investigation, the Department's investigators met with petitioner's officers and their attorney and advised them of the results of their investigation (R. 284a–285a).

On November 27, 1962, some six months later, the Department wrote to petitioner, summarizing the results of both investigations and noting that petitioner had been requested to issue checks to shippers in restitution of the underpayments but that it had declined to do so (R. 426a–428a).[4] The Department's letter stated that petitioner's violations were sufficient grounds to institute disciplinary proceedings which could result in revocation or suspension of petitioner's license, and concluded (R. 428a):

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[4] In its petition for rehearing in the court below, petitioner relied for the first time on the fact that it had previously offered to make restitution of the underpayments found in the 35 shipments on the condition that the Department terminate the informal disciplinary proceedings. The Department had refused to accept this offer because of the seriousness and widespread nature of petitioner's discovered violations.

> This letter is addressed to you in accordance with the requirements of Section 9(b) of the Administrative Procedure Act (5 USC 1008i(b)) [sic] and you are afforded this opportunity to furnish us with any explanation or comments you may have pertaining to the transactions and the allegations listed herein.

Petitioner's attorney replied to this letter several weeks later. He stated that petitioner had properly accounted to shippers and kept adequate records, and that his "client feels very strongly as to its innocence of the charges and that it has not been guilty of any wilful or deliberate underpayments or other violations of the law as charged" (R. 429a–431a). He also stated (R. 430a):

> It is true that a request has been made for payment of these underpayments, but my client feels at this time that there is no liability therefor. Under the circumstances, my client is desirous of defending any disciplinary action which your department may care to institute. * * *

Following the filing of a formal complaint, and after presentation of the evidence, the Hearing Examiner found that petitioner "in its accountings to shippers conjured up false and fictitious figures and amounts in a manner so blatant that its conduct in this regard can only be described as callous and cynical" (R. 570a). He stated that petitioner had committed "repeated, flagrant, and wilful" violations of Section 2(4) of the PACA[*] in failing truly and correctly to account and make payment to its con-

[*] 7 U.S.C. 499b(4).

signors and joint account partners, and recommended that petitioner's license be revoked (*ibid.*).

Reviewing the Hearing Examiner's recommendation, pursuant to authority delegated to him by the Secretary of Agriculture, the Department's Judicial Officer determined that the record disclosed that petitioner had "repeatedly and flagrantly" violated the PACA by failing truly and correctly to account and make payment to its consignors and joint account partners (R. 637a). He concluded that revocation of petitioner's license was justified since petitioner's violations were "the most serious and flagrant type possible under the act" and petitioner had "demonstrated a deliberate disregard" of its fiduciary obligations (R. 639a–640a). He ruled, however, that petitioner's license, instead of being revoked, should only be suspended for 90 days since this was the sanction which had been imposed for similar violations in other cases (R. 640a).

With respect to the question of whether petitioner's violations of the PACA were "willful," the Judicial Officer expressly stated that, if necessary, he would have had "no difficulty" in finding willfulness (R. 639a). He went on to determine, however, that it was not necessary to base the suspension on that ground. He pointed out that the Department's warning letter of November 27, 1962 to petitioner (*supra*, pp. 5–6) fulfilled the notice requirements of Section 9(b) of the APA. He stated, however, that since petitioner thereafter failed to "demonstrate or achieve compliance" with the PACA, the suspension of its license need not be based on the willfulness of the violations (R. 639a).

In its unanimous opinion affirming the Judicial Officer's order, the court of appeals held that the evidence supported the administrative findings, and that Section 9(b) of the APA "was fully complied with here by reason of the fact that the petitioner was notified by letter of the violations and given an opportunity to redress its misconduct, but it failed to so do" (Pet. App. 20).

ARGUMENT

Section 9(b) of the Administrative Procedure Act provides that, in the case of non-willful violations of law, the agency may not institute disciplinary proceedings until it has notified the licensee in writing of his alleged violations and accorded him an opportunity to "demonstrate or achieve compliance" with the law. Contrary to petitioner's assertion, the suspension of its license for repeated and flagrant violations of the PACA was fully consistent with Section 9(b). As the facts plainly show (*supra*, pp. 5–6), as petitioner indeed concedes, and as the court below found (Pet. App. 20), the Department of Agriculture sent petitioner a warning letter which fulfilled the notice requirements of Section 9(b). Petitioner thereafter neither demonstrated nor achieved compliance with the requirement of the PACA.

In addition, while not deeming it necessary to rest his decision on the point, the Department's Judicial Officer explicitly stated his conviction that the record demonstrated that the violations were willful. Petitioner makes no attempt to show that this conviction was unfounded. The decision of the court below was plainly correct, and there is no conflict

among circuits on the question presented. Accordingly, further review by this Court is not warranted.

1. As properly concluded by the court of appeals the Department's letter of November 27, 1962 (*supra*, pp. 5–6) clearly fulfilled the notice requirements of Section 9(b), since it notified petitioner of the charges against it and the possibility of disciplinary proceedings.[7]

Petitioner does not claim that it thereafter "demonstrated compliance" with the PACA. The only conceivable manner in which petitioner could undo the results of its false accountings and underpayments to shippers and thereby "achieve compliance" with the PACA would be by making restitution to the shippers.[8] Although petitioner paid $1,676.20 to

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[7] See U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 91 (1947): "While the warning must be in writing, it need not take any special form." See also *Shuck* v. *Securities and Exchange Commission*, 264 F. 2d 358, 360 (C.A. D.C.).

[8] In its brief in the court of appeals (pp. 44–45), the government asserted at one point that petitioner could not, as a practical matter, "achieve compliance" with the PACA, since it could not undo the erroneous accountings which it had rendered or rectify the results of its improper record-keeping in the past. In oral argument, however, the government stated that, in any event, petitioner had not "achieved compliance" since it had failed to make restitution of the discovered underpayments. The court of appeals evidently based its decision on this latter ground when it held that Section 9(b) was complied with since "petitioner was notified by letter of the violations and given an opportunity to redress its misconduct, but it failed to so do" (Pet. App. 20). Whether the government's earlier assertion in its brief is correct or not is irrelevant, since it was not accepted or relied upon by the court below.

Hicks Produce, Inc. (*supra*, p. 4), it has never made restitution of the underpayments discovered in the second investigation, *i.e.*, those relating to the other 35 shipments (*ibid.*). Petitioner only offered to pay these amounts on the condition that the Department dismiss the informal disciplinary proceedings initiated against it (see note 5, *supra*). In view of the serious and widespread nature of petitioner's violations, it is not surprising that this offer was rejected by the Department.[9] Subsequently, petitioner replied to the Department's warning letter of November 27, 1962 by denying any violations or underpayments and refusing to make restitution (*supra*, p. 6). Even assuming that petitioner could feasibly undo the results of its erroneous accountings, and thereby "achieve compliance" with the PACA, by making restitution of its underpayments, it has never in fact done so.[10]

2. In view of the foregoing, the Judicial Officer was correct in his belief that it was not necessary to base the suspension order upon the willfulness of the violations. Nevertheless, he went on to state that, if willfulness were an essential ingredient, he would

[9] Because of the conditional nature of petitioner's offer to make restitution, which the Department, under the circumstances, could properly and did reject, petitioner's assertion (Pet. 2, 4) that it tendered repayment of the alleged underpayments is inaccurate and misleading.

[10] Since discrepancies were found in every one of the 35 shipments which the investigators selected at random for examination, it is clear that there were underpayments in numerous other cases (see note 11, *infra*). Yet petitioner, to our knowledge, has never audited its records to determine the amounts underpaid in those other cases, and has never offered to make restitution of the amounts which would be so determined.

have "no difficulty" in finding (on the basis of the evidence of petitioner's repeated, flagrant violations) that the misconduct was willful (*supra*, p. 7). For purposes here, this was tantamount to a finding of willfulness, and, without a doubt, is amply supported by the record.

The Department of Agriculture's detailed investigations of petitioner's activities revealed that, in total disregard of its own records, petitioner repeatedly rendered false accountings and made underpayments to shippers (*supra*, pp. 3–5).[11] Findings to this effect were made by the Hearing Examiner and the Judicial Officer (*supra*, pp. 6, 7), were sustained by

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[11] Petitioner states that it only underpaid $3,856 over a period of 18 months in a business which grosses $5 million yearly (Pet. 4, n.1). The $5 million figure relates to income from all operations, not just consigned and joint account transactions. Petitioner handled about 2,300 shipments of produce per year, with 25 to 35 percent of these shipments being handled as consigned or joint account produce (R. 630a). Thus, approximately 575 to 800 shipments were handled yearly on consignment or joint account. In the second investigation 35 shipments were selected at random for detailed examination; discrepancies were discovered in all 35 cases (*supra*, p. 4). From the discussion above, it is obvious that the transactions examined involved approximately only 4 to 6 percent of petitioner's total yearly consignment and joint account business. Without intimating that discrepancies existed with respect to all of petitioner's shipments, since found in all 35 cases actually examined, the total amount of petitioner's yearly underpayments to its consignors and joint account partners, under any fair estimate, in all likelihood substantially exceeded the amounts involved in the 35 random cases which were examined by the Department.

Petitioner's deliberate overpayment of shippers in some instances (*supra*, p. 4), it should be noted, is entirely consistent with its overall scheme of defrauding shippers. See note 4, *supra*.

the court of appeals (*supra*, p. 8), and have not been challenged here by petitioner. On the basis of these findings, petitioner's utter disregard of its fiduciary obligations (see R. 631a–633a; 639a–640a) can properly be viewed as constituting "willful" violations of the PACA. See *United States* v. *Illinois Central R. Co.*, 303 U.S. 239, 242–243; *Eastern Produce Co.* v. *Benson*, 278 F. 2d 606, 609 (C.A. 3); *Capitol Packing Co.* v. *United States*, 350 F. 2d 67, 78–79 (C.A. 10).[12] Section 9(b) of the APA (*supra*, p. 2) of course specifically excepts "cases of willfulness" from its "opportunity to * * * achieve compliance" language.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

BAREFOOT SANDERS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
LEONARD SCHAITMAN,
Attorneys.

DECEMBER 1966.

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[12] The accuracy of petitioner's assertion (Pet. 5) that the effect of the suspension, heretofore not executed, will be to destroy its business has never been admitted by the government, and no finding as to this was made below. Insofar as we can determine, the assertion is wholly unfounded.

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 773.

MANDELL, SPECTOR, RUDOLPH CO.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

SUPPLEMENTARY STATEMENT.

The Government's Brief contains numerous distortions of the Record and even matters outside the Record. Corrections and refutations of the more important of these points are set forth in the footnote.[1]

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1. The Government has disputed petitioner's offer to make restitution (U. S. Brief, p. 10, n. 9) and the effect of the threatened license suspension upon petitioner's business (U. S. Brief, p. 12, n. 12). Petitioner has therefore reprinted as an Appendix hereto the Affidavits of Ned Stein, counsel, and Irvin Spector, President of MSR, which were submitted as exhibits to the Petition for Rehearing below. The Government advised the court below by letter of September 9, 1966 that it chose not to respond thereto because "no significant matters not previously briefed or argued orally by the parties" were raised. The averments of the affidavits were thus admitted by the Government. *Chattanooga Pharm. Assn. v. United States Department of Justice,* 358 F. 2d 867 (6th Cir. 1966).

It is not true that the 35 shipments in the second investigation were selected for detailed examination "at random" (U. S. Brief, p. 4, p. 10, n. 10, p. 11). The Department investigators testified that they went "back and forth" through all of MSR's files and selected those shipments which were processed and sold by MSR in the shortest time. They thus selected an unrepresentative sample of the fastest-moving transactions in which error was most probable because of the time-pressure under which records thereof necessarily were kept (R. 101-02a, 289a-95a). After going through all of MSR's files the 35 shipments were the only ones in which the investigators reported incorrect accountings.

The "notations" which the Government contends (U. S. Brief, p. 4, n. 4, p. 11, n. 11) "indicated that overpayments were deliberately made" were in some cases found in shipments in which the investigators found an "underpayment" (E.g., R. 359a-61a). Taking into account the unlikelihood that one would deliberately pay too much and the arbitrary averaging techniques employed by the investigators to reach their findings, the record indicates that there was neither an underpayment nor an overpayment in these transactions.

ARGUMENT.

1. Respondent's Brief Effectively Concedes That Petitioner Was Denied Its Statutory Right to Achieve Compliance.

The record is clear that petitioner actually achieved compliance with the PACA provisions and Regulations prior to the disciplinary proceedings by revising and reforming its system of record-keeping and accountings to shippers (R. 300a-04a, 308a, 321a). The Government continues to ignore this fact, but has now retreated from its extreme position below that it was impossible for petitioner to achieve compliance. In this Court the Government concedes that it was at least "conceivable" for petitioner to achieve compliance by making restitution to shippers; it then contends that the Department afforded petitioner its statutory "opportunity" to make compliance by requesting such restitution, which petitioner failed to make. Yet the Government admits that at the crucial time when restitution was requested by the Department, petitioner actually offered full restitution of the disputed underpayments, to be considered as compliance, thereby terminating the disciplinary proceedings. The Department rejected this offer on the ground that petitioner could not, as a matter of law, achieve compliance.

Although the Government now states that the Department's rejection of petitioner's offer of repayment was "not surprising", surely it would have been most surprising for petitioner to pay over sums of money which it believed and believes it did not owe with no assurance that its payment would resolve the dispute—and, in fact, in the face of the Government's contention that such payment would be a futile and pointless act.

The "condition" which the Government claims petitioner placed upon its offer of payment was nothing more

than the legal right established by § 9(b) of the APA for petitioner's protection. Under § 9(b), the opportunity to achieve compliance must be afforded in advance of license suspension proceedings in order to give the licensee a chance to *avoid* them. The Government's request for restitution while denying the concomitant opportunity for avoidance of disciplinary proceedings was obviously a denial of the opportunity to achieve compliance. It position here that petitioner failed to achieve compliance by its failure to make restitution is thus not only untenable but lacking in candor.

2. The Government Is Improperly Attempting to Avoid the Requirements of § 9(b) of the Administrative Procedure Act by Invoking Now, for the First Time, the "Willfulness" Exception.

The Department's Complaint against petitioner did not charge any willfull violation of the PACA. In fact, it alleged that petitioner had been afforded the opportunity to "achieve compliance", applicable under § 9(b) of the APA to non-willful violations only (R. 3a-16a). Petitioner was thus on notice that the case against it was one for non-willful violations, and the case was heard on that basis.

Regardless of the Judicial Officer's gratuitous comment that if necessary he could have found willfulness, the fact remains that he made no such finding. Indeed a suspension order based upon a finding of willfulness would have deprived petitioner of due process because no such violation had been charged.

The Government expressly advised the court below that the question of whether or not the violations were willful was "irrelevant" in this case (Respondent's Brief below, p. 45, n. 24). Now, apparently recognizing the weakness of its position on the "compliance" issue, it has boldly reversed its position of many years and seeks to exclude petitioner from the protection guaranteed it by § 9(b), by labelling this case, for the first time, as one of "willful-

ness". The impropriety of raising this contention on review when it was not raised below,[2] is here compounded by the new problems of deprivation of due process and substantiality of evidence which arise if the willfulness issue is now to be injected into this case.

CONCLUSION.

Since willfulness was neither found nor charged, since petitioner was deprived of its right to make compliance, and since the interpretation of the § 9(b) right by the court below has effectively destroyed the protection guaranteed federal licensees, petitioner again urges that a writ of certiorari issue to review the decision of the Court of Appeals for the Third Circuit for the reasons stated in its Petition.

Respectfully submitted,

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2. Moreover, this Court has established as a "fundamental rule of administrative law" that a reviewing court may not uphold an agency determination by substituting a basis other than that invoked by the agency. *Securities Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 87-88, 87 L. Ed. 626, and 332 U. S. 194, 196, 91 L. Ed. 1995, 1999.

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APPENDIX.

Affidavit of Ned Stein.

(Exhibit "A", to Petition for Rehearing below.)

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } ss.:

I, NED STEIN, attorney for Mandell, Spector, Rudolph Co., being duly sworn according to law, depose and say:

1. That I was personally present at the time when the representatives of the U. S. Department of Agriculture determined the amount that was allegedly due Hicks Produce Company which was done in the office of Mandell, Spector, Rudolph Co. Payment was made at that time without being an admission of liability on the part of Mandell, Spector, Rudolph Co. and with the further understanding that there would be no further proceedings or investigation of Mandell, Spector, Rudoph Co. by representatives of the U. S. Department of Agriculture.

2. That immediately following the payment in the Hicks Produce Company matter, the representatives of the U. S. Department of Agriculture returned for the purpose of checking the records of Mandell, Spector, Rudolph Co. as to any further alleged violations and that hundreds of files were inspected by the representatives and eventually the representatives of the U. S. Department of Agriculture claimed alleged overpayments and underpayments on 35 shipments; that a request for payment of the alleged overpayments and underpayments was made, and your affiant offered on behalf of Mandell, Spector, Rudolph Co. to make such payment to the representatives of the U. S. Department of Agriculture providing it was understood that the disclipinary proceedings against Mandell, Spector, Rudolph Co. would be terminated; that at the time that the amount was submitted to Mandell, Spector, Rudolph

Co. for payment, all of the books and records of Mandell, Spector, Rudolph Co. were put into compliance with the regulations of the U. S. Department of Agriculture; that present at the said discussion were your affiant and Paul Koenigsberg, Mr. Carlucci and Harry Apostoleris, all representatives of the U. S. Department of Agriculture, Mr. Rudolph, Mr. Spector and Mr. Mandell. At the said time, the representatives of the U. S. Department of Agriculture refused to agree that the payment would constitute compliance and therefore terminate the disciplinary proceeding that had been instituted, and accordingly payment was not made, because we believed payment should constitute compliance and it was felt that payment may constitute an admission of liability in the pending disciplinary proceeding which we had denied at all times..

NED STEIN

Sworn to and subscribed before me this 2d day of September, 1966.

Affidavit of Irvin Spector.

(Exhibit "B" to Petition for Rehearing below.)

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

I, IRVIN SPECTOR, being duly sworn according to law, depose and say that I am Presidenf of Mandell, Spector, Rudolph Co., and:

1. That I was present at the time that the investigation of the Hicks Produce Company compliant was completed and an amount was determined to be due and payable to Hicks Produce Company; also present were Paul Koenigsberg, Harry Apostoleris and Mr. Carlucci, representing the U. S. Department of Agriculture, and Ned Stein, William Mandell and Charles Rudolph, on behalf of Mandell, Spector, Rudolph Co.; that payment was made on the promise of the representatives of the U. S. Department of Agriculture that there would be no further proceedings or investigation against Mandell, Spector, Rudolph Co., and that the payment was made without an admission of liability.

2. Immediately thereafter, an informal disciplinary complaint was lodged against Mandell, Spector, Rudolph Co., and after a lengthy investigation in which we cooperated and hundreds of files were examined, the representatives of the U. S. Department of Agriculture determined that there were 35 shipments on which there was a balance due by either overpayments or underpayments. A request was made for payment of this amount by the representatives of the U. S. Department of Agriculture, and Mandell, Spector, Rudolph Co. agreed to make this payment, without admitting any liability, provided further proceedings in connection with the disciplinary action would be terminated. The representatives of the U. S. Department of Agriculture stated that the acceptance of the amount allegedly found to be due could not be accepted as

a compliance by Mandell, Spector, Rudolph Co., but that the disciplinary complaint would have to continue to be processed. At this particular time, Mandell, Spector, Rudolph Co. had complied fully, insofar as the maintenance of its books and records is concerned, with the regulations of the U. S. Department of Agriculture.

3. At a time subsequent to the determination of the amount due on the 35 shipments which were the basis of the disciplinary complaint, your affiant met with John Dimond and Jack J. Gardner of the U. S. Department of Agriculture with a view of adjusting the complaint, and an offer was made by your affiant to make payment of the amount alleged by the Government to be due in connection with the 35 shipments providing it would be considered that Mandell, Spector, Rudolph Co. was in compliance and the disciplinary proceedings be terminated. This offer was rejected by Mr. Dimond.

4. A 90-day suspension will, in my opinion, effectively put this company out of business permanently, because our consignors will have to make arrangements with other brokers. This is what happened when another Philadelphia commission broker, Eastern Produce Co., was suspended for only 45 days a few years ago. It will destroy the livelihood of 30 innocent employees, and destroy a business now grossing approximately $5,000,000 a year, because of alleged estimated underpayments (and *overpayments*) totalling less than $4,000.

IRVIN SPECTOR

Sworn to and subscribed before me this 2d day of September, 1966.